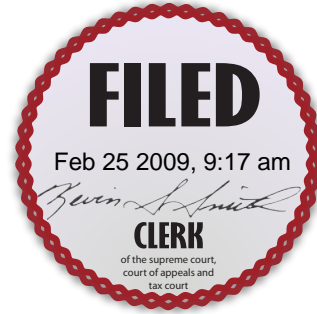


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

T.W.,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 49A02-0808-JV-749
)	
STATE OF INDIANA,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Danielle Gregory, Magistrate
Cause No. 49D09-0705-JD-1689

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

T.W., Jr. (hereinafter “T.W.”) appeals the true finding that he was delinquent for committing an act that would be theft, a Class D felony if he were an adult. He asserts there was no evidence he exerted unauthorized control over the stolen items found in his house. Because the State did not prove T.W.’s control over the stolen items, we reverse his adjudication as a delinquent.

FACTS AND PROCEDURAL HISTORY

On December 13, 2006, someone broke into Sylvia Smith’s home. The intruder or intruders took jewelry, paperwork, a DVD player, a television, and a safe containing jewelry and more than \$21,000 in cash.

Two days later, before regular trash collection in her neighborhood, Smith and her fiancé walked to a nearby house to look in the trash bin that was sitting next to the alley for collection. Visible near the top of the bin were some of Smith’s tax documents, a box with Smith’s daughter’s name on it, and mailing envelopes Smith used to buy and sell jewelry. Smith called the police. After finding more of Smith’s items in the trashcan, the police went to the front door of the residence where the trashcan was located.

T.W., Sr. (hereinafter “Father”) consented to a police search of the house. In the basement, police found Smith’s safe. The safe was broken into pieces and the contents had been removed. In the closet of one of the three upstairs bedrooms, police found two of Smith’s jewelry boxes.

On May 31, 2007, the State alleged T.W. was a delinquent for committing theft. After a fact-finding hearing, the court found T.W. committed theft and adjudicated him a delinquent.

DISCUSSION AND DECISION

When the State seeks to have a juvenile adjudicated a delinquent, it must prove every element of the alleged offense beyond a reasonable doubt. *G.R. v. State*, 893 N.E.2d 774, 776 (Ind. Ct. App. 2008). When we review the trial court's determination, we may consider only the evidence and reasonable inferences that support the judgment. *Id.* We may not reweigh the evidence or assess the credibility of the witnesses. *Id.*

The State alleged T.W. committed an act that would be theft if committed by an adult. Theft occurs when a person “knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.” Ind. Code § 35-43-4-2. Exerting unauthorized control over property “means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property.” Ind. Code § 35-43-4-1. A finding of theft may be supported by circumstantial evidence alone. *Bennett v. State*, 871 N.E.2d 316, 323 (Ind. Ct. App. 2007).

The State argues only that T.W. exerted unauthorized control over Smith's property by virtue of his possession of the property. However, the State did not prove T.W. had either actual or constructive possession of the property.

The State did not prove T.W.'s actual possession of the stolen goods because the State did not offer evidence, or even allege, that anyone saw T.W. in possession of Smith's property. *Cf. Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999) (“Actual possession occurs when a person has direct physical control over the item.”).

As for constructive possession, the State asks us to affirm T.W.'s adjudication based on three pieces of circumstantial evidence: (1) Father told police the room where some of the stolen items were found in a closet was "his son's" (Tr. at 81); (2) the room contained male clothing; and (3) the room contained movies and music associated with young adults.

Evidence of constructive possession is sufficient if the State shows the defendant had both the capability and the intent to maintain dominion and control over the contraband. *Hardister v. State*, 849 N.E.2d 563, 573 (Ind. 2006). To prove intent to maintain dominion and control, the State must demonstrate a defendant had "knowledge of the presence of" the property. *Donnegan v. State*, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 972 (Ind. 2004). Knowledge "may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." *Id.* (quoting *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999)). The "additional circumstances" can include:

(1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson, 715 N.E.2d at 836.

The State did not prove T.W. had exclusive control of the room where the stolen goods were found. The State did not call a witness to testify to the number of people who

lived in the house, the number of young adults living in the house, the number of males living in the house, or the number of people sharing each bedroom. That the room contained clothing, music and movies generally associated with males or young adults does not, without more, permit the inference that T.W. was the person who had dominion and control over the bedroom and the closet where the stolen items were located.

Neither can we infer T.W.'s exclusive control from Father's statement regarding the room. The court reporter's transcription of the officer's oral testimony indicates the officer testified Father said the room was his "son's" room. (Tr. at 81.) Father's statement could suggest Father had only one son, that son was T.W., and the room was T.W.'s room. However, Father's oral statement to the officer, and the officer's oral testimony, would have sounded the same to the court reporter (or any other listener) if Father had been indicating multiple sons occupied that bedroom.¹ The record therefore provides no support for a finding Father's reference demonstrated control of the room by T.W. alone, or to some other son individually, or to multiple sons.

The State did not call Father as a witness, and no other witness testified regarding how many sons Father had. Neither did any witness testify that the room at issue was T.W.'s room.² Without such evidence, the State could not demonstrate T.W. was the son who exercised dominion and control over the bedroom with the closet in which some of the stolen items were found.

¹ In other words, Father might have said it was "his sons' room."

² The State repeatedly attempted to admit testimony from the officer regarding the name of the person Father said possessed the room, but the court repeatedly sustained the T.W.'s hearsay objection and the testimony was never admitted. (See Tr. at 82, 86, 87, 91.)

At trial, the State recognized this gap in the evidence, as it requested a continuance in order to subpoena Father to testify about T.W.'s possession of the room. (*See* Tr. at 99.) A statement by T.W.'s counsel suggests the trial court also recognized this gap in the evidence: "The Court believed [T.W.] was responsible for, for some of the theft that occurred. It certainly seemed to me that the Court also believed that there may have been other people involved or more responsible." (Tr. at 119.).³

Nor did the State show additional circumstances pointing to T.W.'s knowledge of the presence of the contraband that could prove dominion and control if possession was non-exclusive. No one testified the other items in the closet belonged to T.W.⁴ T.W. was not found in proximity to the items, he did not make incriminating statements, and he did not flee. *See Henderson*, 715 N.E.2d at 836. Therefore, the State did not demonstrate any additional circumstances pointing to T.W.'s knowledge of the stolen items in the closet.

The record contains no evidence T.W. had exclusive possession of the bedroom or closet where Smith's jewelry boxes were found or T.W. knew Smith's property was in that closet. Because the State did not demonstrate T.W. was the person who exerted unauthorized control over Smith's items, we reverse his adjudication as a delinquent.

Reversed.

FRIEDLANDER, J., and BRADFORD, J., concur.

³ T.W.'s counsel so characterized the court's finding at T.W.'s dispositional hearing. Neither the State nor the court disagreed with counsel's assessment. However, we cannot confirm the statement because the written finding at issue was not provided in the record on appeal.

⁴ As we noted earlier, we will not infer T.W.'s possession of the items in the bedroom from the mere fact many of them appeared to belong to a young adult or male, when the record contains no evidence to suggest he was the only young adult or male living in the house.

